Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-387

MOBIL OIL CORPORATION, *Petitioner,*

v.

MRS. GILBERT LEE WOOLARD, et al, *Appellees.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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MRS. GILBERT LEE WOOLARD, et al, *Appellees.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner Mobil Oil Corporation respectfully prays that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on June 7, 1973 and the denial of Petitioner's Petition for Rehearing and Petition for Rehearing En Banc entered on July 16, 1973.

OPINION

The opinion of the United States Court of Appeals for the Fifth Circuit, ____F.2d____ appears as Appendix "A" hereto. The Order denying Mobil Oil's Petition for Rehearing and Rehearing En Banc appears as Appendix "B" hereto.

JURISDICTION

The Judgment of the Court of Appeals was entered on June 7, 1973, and the Petition for Rehearing and Rehearing En Banc was denied on July 16, 1973. This Petition for Certiorari was timely filed within ninety days from those dates. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether a landlord not in possession or control of the leased premises owes a duty to the lessee's employees to correct unsafe conditions created by the lessee.

STATUTORY PROVISIONS INVOLVED

There are no statutory provisions involved in this appeal.

STATEMENT OF THE CASE

This is an action for damages for injuries and death sustained by Gilbert Lee Woolard as a result of an explosion and fire occurring at the Beaumont Metering Station of Mobil Pipe Line Company on June 20, 1969. The fatal injuries of the deceased were sustained during the course of his employment with Mobil Pipe Line Company. Suit was brought pursuant to Article 4671 *et seq.* and Article 5525 of the Revised Civil Statutes of the State of Texas, and was based on alleged negligence of Mobil Oil Corporation and alleged gross negligence of Mobil Pipe Line Company. Federal jurisdiction was based on diversity of citizenship.

The trial of this case began on March 1, 1972 in the United States District Court for the Eastern District of Texas. In Answers to Special Interrogatories submitted by the court, the jury found that Mobil Oil Corporation was

negligent in failing to provide a flare system to be used by the metering station in its operations. It also found several acts of gross negligence committed by Mobil Pipe Line Company. Judgment was entered on behalf of the Plaintiff on May 15, 1972 against both Mobil Oil Corporation and Mobil Pipe Line Company.

The United States Court of Appeals for the Fifth Circuit affirmed the judgment as to Mobil Oil Corporation and reversed as to Mobil Pipe Line Company. This Petition for Certiorari is filed on behalf of Mobil Oil Corporation.

We fully realize that this Court would rarely grant such a Petition in a case of this nature. The holding in this case, however, places a new and intolerable burden upon every landowner in this country. Taken literally, this holding means that a lessor has a duty to seek out and correct dangerous or unsafe conditions that are created by his lessee. That duty would extend not merely to third persons but also to the very persons that create such a dangerous condition. In so holding, the Fifth Circuit has ignored Texas law, and allowing its opinion to stand will create hopeless confusion among landowners and their attorneys who attempt to advise them. It clearly calls for an exercise of this Court's supervisory powers.

REASONS FOR GRANTING THE WRIT

Some review of the facts of this case and of the operation being conducted the night of the accident is necessary to enable this Court to understand the simple fact that Mobil Oil Corporation had absolutely nothing to do with any of it and the impossible burden placed upon Petitioner and those similarly situated by the Court of Appeals.

On the night of June 20, 1969, Gilbert Lee Woolard, an employee of Mobil Pipe Line Company, was working

on the premises of the Beaumont Metering Station of that company with two other men—Red Marsh, another employee of the pipe line, and Walton James Goodwin, an employee of Mobil Oil Corporation. The Metering Station is located on a tract of land approximately .8 of an acre in size just outside the Mobil Oil Corporation Refinery at Beaumont. The land is leased from Mobil Oil Corporation to Mobil Pipe Line Company. When a product passes through the meters on these premises, it in effect has been transferred from the custody of Mobil Pipe Line Company to that of Mobil Oil Corporation.

In June of 1969, three pipe lines came into the metering station in Beaumont. One was a 20-inch crude line, one a 16-inch crude line, and one a 10-inch liquid petroleum gas (LPG) line coming from Corsicana. It is the operation of this 10-inch LPG line that is at issue in this lawsuit.

Prior to the date of the accident involved in this lawsuit, it had been necessary for Mobil Pipe Line Company to repair sections of pipe at two locations between Corsicana and Beaumont. Before the repair work was started, it was necessary to insert quantities of water into the pipe line. By inserting the water into the pipe line, the repairs necessary could be made without great danger of fire or explosion. Prior to the time the contents of the pipe line were to be delivered to Mobil Oil Refinery for processing, it was necessary to remove the quantities of water which had been inserted into the line. It was the operation of removing this quantity of water from the pipe line that was being carried on at the time of the explosion and fire at the Beaumont Metering Station facility.

In the repair process, the water inserted had become separated into two slugs. The first slug arrived at the Beaumont Metering Station at approximately 9:15 on the

morning of June 20, 1969. Approximately 697 barrels of water were discharged during the next hour and a half. There are no allegations that there were any problems with the discharge procedure at this time. At any rate, there were no accidents.

The second slug of water arrived at the metering station at approximately 7:00 P.M. on the evening of June 20, 1969. Since it is the operation of discharging this water that forms the basis of this lawsuit, we will attempt to go into the nature of this operation in some detail.

As any product enters the Beaumont Metering Station facility through the 10-inch LPG line, any of several things can be done with the product. Normally, when the product is in fact LPG, it simply passes through the meters and is directed toward the Mobil Oil Corporation Refinery. The operation being conducted on June 20, 1969, although not an unusual operation, was not daily routine. Thus, when the water entered that facility through the 10-inch LPG lines, it was directed to a 4-inch discharge line and into a settling tank with a 2-inch discharge line on the bottom of it. The water was thus discharged through these two lines into a ditch which paralleled the railroad track on the east side of the facility. It then ran down this ditch and into a nearby swamp.

It was also possible to direct the incoming product to a flare system located on Mobil Oil Corporation Refinery premises. The product would be directed to the flare if some sort of an emergency arose.

It is undisputed that at the time of the explosion and fire, the product coming in through the 10-inch lines was being diverted through the 4-inch line and also into the settling tank and through the 2-inch line. There is no evidence that the flare system was used or that its use was

even contemplated. Furthermore, the valves on the pipes leading to the refinery were closed.

At the time of the accident, the metering station was substantially in the same condition that it had been for a number of years. One witness familiar with the operation of the metering station testified that in the seven years preceding the accident he could recall at least six times that the draining operation being conducted on the night of the accident had been performed. During all of those years, there were no fires or accidents of any kind. In other words, the operation being carried on on the night of June 20, 1969 had been conducted safely on many occasions over a substantial number of years. It was only through an unforseeable and bizarre set of facts, many of which are not understood to this day, that three men were killed in an essentially safe operation.

As might be expected, there is an area of intermingling between the water and the LPG known as an interface. In the interface at both the head and the tail of the slug of water were inserted scrapers, or pigs, which served the dual purpose of cleaning the pipe line and signalling the arrival of the new product. The arrival time of the interface is calculated by the dispatcher in Dallas by dividing the total amount of displacement in a section of line by the number of barrels being pumped per hour.

Prior to the arrival of the interface, Marsh was given an estimated time of arrival of 12:35 A.M., but at 10:45 P.M. was told that it could arrive at any time. The fire and explosion took place at approximately 11:25 P.M.

The accident occurred when the LPG following the slug of water arrived at the metering station, discharged apparently through the 4-inch and 2-inch lines, and from some unknown source, was ignited. The resulting explosion and fire took the lives of all three workers.

It is also without dispute that at the time of his death Gilbert Woolard was an employee of Mobil Pipe Line Company, a subscriber to the Texas Workmen's Compensation Act, and that benefits under that Act have been paid unto the survivors of Gilbert Lee Woolard.

On appeal, the Court of Appeals held that Texas courts would impose a duty of ordinary care upon a landlord who shares control of the leased premises with his tenant. The elements of sharing found by the Court of Appeals were:

(1) Mobil Oil could veto any of Mobil Pipe Line's proposed alterations in the metering station which Mobil Oil considered unsafe to its employees;

(2) Mobil Oil employees had keys to unlock gates in the fence surrounding the metering station;

(3) New Mobil Oil executives were given a tour of the metering station as part of their orientation; and

(4) Goodwin, the Mobil employee who was killed in the explosion, had the authority to decide when to open and close valves during the purging operation.

It is important to point out in connection with Goodwin's authority that even assuming the Court of Appeals' statement is true, which it is not, liability was imputed to Mobil Oil Corporation not on the basis of anything Goodwin did or did not do, but rather on the failure of Mobil Oil Corporation to provide the pipe line company with a flaring system for use in the pipe line company's operations.

Out of this "control" over the premises arose the duty, according to the Court of Appeals, to interfere

actively with the busineses operation conducted on the adjoining premises. Specifically, in this case, the Court of Appeals has now held that Mobil Oil Corporation was negligent in not providing additional equipment for use by another company in that company's operations. The holding that these elements constituted sufficient control to establish a duty on the part of the landlord completely ignores established Texas law.

The Court of Appeals, moreover, in its apparent effort to hold Mobil Oil Corporation liable on some invented theory neither argued nor briefed by either side, has ignored the established law of the State of Texas that an employee of the tenant stands in no better shoes than the tenant himself. The court could have disposed of this entire matter without having to strain to find joint control had it not ignored Texas law in this regard.

It is ironic that the very cases cited by the Court of Appeals in arriving at its conclusion that "Texas courts would impose a duty to use ordinary care upon a landlord who shares control of the leased premises with his tenant" preclude liability on the part of Mobil Oil Corporation in this very situation. Consider, for example, *Johnson v. Murry Co.*, 90 S.W.2d 920 (Tex. Civ. App.—Austin 1936, writ dism'd), cited by the court for the proposition that Texas court impose upon the landlord a duty owed to his tenant and those entering under the tenant to use ordinary care when the lease is a mere sham employed by the landlord to fraudulently conceal his continued control over the premises. We do not so read that case, but that is immaterial. That case stands much more clearly for the proposition that "it is settled law that where a dangerous or defective condition of the leased tenement or machinery is as well known to the lessee as to the lessor, the latter may not be held liable

at the suit of the lessee's servant or employee; because of action, if any exists, is against the lessee." *Id.* at 924, citing *Marshall v. Heard,* 59 Tex. 266 (1883). A careful reading of the case will show that the landlord there maintained at least as much "control" over the premises as in this case. In fact, it is almost inconceivable that a landlord would not retain at least this much "control" over the premises. It is important for this Court to realize that this decision completely changes the nature of the duty owed by every landlord in this State. This degree of control over the premises can always be found, and the landlord will always then be deemed to control the premises jointly with his tenant. This is sheer nonsense.

The Court of Appeals did cite in footnote 4 of its decision in *Fergeson v. National Bank of Commerce,* 174 S.W.2d 1015 (Tex. Civ. App.—Galveston 1943, no writ). In that case plaintiff sued the owner of an office building for negligence in maintaining the stairways and lights in the common parts of the building. The court in that case held that the landlord's only legal duty was to use reasonable care to keep its stairs and lights in a reasonably safe condition. This makes complete sense, as do the cases cited by the Court of Civil Appeals holding that the landlord is under a duty to use reasonable care to eliminate unsafe conditions on portions of the leased premises over which he has retained exclusive control, and in those areas reserved for the common use or benefit of several tenants. This makes sense because only the landlord is in a position to undertake that duty. It is in no sense an exception to the rule concerning the duties of landlords, as found by the Court of Appeals, but rather is a statement of the duty of a landlord concerning unleased property.

In *Medlin v. Havener*, 98 S.W.2d 863 (Tex. Civ. App. —Ft. Worth 1936, no writ), plaintiff alleged that the lessors of land on which a swimming pool was located were negligent in failing to provide a cover over a drainage pipe that would prevent the foot or leg of a swimmer from being drawn by suction into the drain while the pool was being drained. In that case the court stated:

> "It is a well settled rule of decisions of this State that in the absence of a special contract to the contrary, and in the absence of fraud and deceit inducing the lessee to believe the landlord would make such repairs, the lessor is under no implied obligation to the lessee to keep the rented premises in a condition safe and suitable for the uses to be made of the demised premises by the lessee. And in the absence of a showing that the condition of the premises causing the injury constituted a nuisance existing at the time the lease was made, and that the lease was made with the intention of the lessor that it would be used by the lessee in that condition, then the lessor is not liable to the lessee or his servant or agent or invitee for injuries sustained as a result of the unsafe condition of the premises. *It is specifically held that the servant or agent or invitee stands in the shoes of the lessee and with no higher right. See Marshall v. Heard*, 59 Tex. 266; *Perez v. Rabaud*, 76 Tex. 191, 13 S.W. 177 L.R.A. 620; *O'Connor v. Andrews*, 81 Tex. 28, 16 S.W. 628, 629; *Paternostro v. Bradley* (Tex. Civ. App.) 262 S.W. 896; *Jackson v. Amador* (Tex. Civ. App.) 75 S.W.2d 892 (writ of error dismissed). *Id* at 864 (emphasis supplied).

Similar allegations of an unsafe swimming pool were contained in *City of Ft. Worth v. Barlow*, 313 S.W.2d 906 (Tex. Civ. App.—Ft. Worth 1958, writ ref'd n.r.e.). Again the Court stated:

> "Where there is no agreement by the landlord to repair the demised premises and he is not guilty of any fraud or concealment by failing to disclose hidden defects of which he has knowledge, the tenant takes the risk of their safety and the landlord is not liable to him or to *any other person* entering under his title or by his invitation for injury caused by their unsafe condition." [Citations] *Id* at 917 (emphasis is original opinion)

In *Buffalo Lakes, Inc. v. McGrew,* 285 S.W.2d 483 (Tex. Civ. App.—Amarillo 1955, writ ref'd n.r.e.), the court again affirmed the rule of *Marshall v. Heard, supra,* that:

> "At common law the occupant, and not the owner, is bound, as to the public, to keep the premises in such repair that they may be safely visited by the public. . . . And it is well settled that to give the party injured a right of action for damages arising from defects in rented premises against the owner, he must show that such defects existed at the time the premises were leased. . . . Those who claim upon the ground that they were invited into a dangerous place must seek their remedy against the person who invited them. If they are the guests of the tenant he, and not the landlord, is the person from whom they must seek redress for injuries caused by defects in the premises."

As applied to the facts of *Buffalo Lakes, Inc. v. McGrew, supra,* the lessor of land on which a junk car race track was located was not liable to an injured spectator. As the court stated,

> "There is no evidence in this record that there was any defect in the leased premises at the time of the making of the parol lease between Buffalo Lakes, Inc. and Ralph Roberts as the race track was con-

> structed by Roberts following the making of the lease. If there was any defect in the construction of the race track since it arose following the execution of the lease by Appellant, Buffalo Lakes, Inc., and was due solely to the acts of the lessee, Roberts, he was solely liable for the injury proximately caused thereby." *Id.* at 486.

Flynn v. Pan American Hotel Co., 183 S.W.2d 446 (Tex. Sup. 1944), makes completely clear that "the employee of the tenant or lessee occupies no better position as against the landlord than that of his employer." *Id.* at 449.

In *Daniels v. Shell Oil Co.*, 485 S.W.2d 948 (Tex. Civ. App.—Ft. Worth 1972, writ ref'd n.r.e.) a service station employee sued the landlord, Shell, alleging negligence in the operation of the station. As might be expected, the degree of "control" over the premises and operation in that case makes the "control" found by this Court in the case at bar look minute by comparison. Plaintiff in that case alleged that Shell retained the right to regulate the work hours of the service station attendants. The allegations were quite similar to those in this case. They alleged that Shell Oil Company was not the employer of plaintiffs, but that the agreement between Shell and its tenant gave Shell the right to control plaintiff in such a way as to require him to work alone in the early morning hours. The court found that Shell, while it did retain many rights, did not retain those rights relied on. The court, however, went further:

> "But even if Appellee did have the right of control in the two respects referred to we would still be required to affirm the trial court's judgment.

> "In the absence of an agreement by a landlord to make repairs during the term of the lease and in the absence of hidden defects of which the landlord was aware that existed at the time the premies were let, the tenant takes the risk of the safety of the leased premises, and *the landlord is not liable to lessee or to lessee's employees for injuries that are caused by an unsafe condition of the premises.* [Citations] The courts hold that an employee of the lessee in such a case stands in the shoes of the lessee and has no higher right. Citations." *Id.* at 951. (emphasis supplied)

Certainly there is no dispute that Mobil Pipe Line Company, the tenant, would have no cause of action against Mobil Oil Corporation for damages araising out of a condition it created. Woolard, Mobil Pipe Line's employee, has no higher right. Texas law is completely settled in this regard.

The theory on which this Court chose to find Mobil Corporation liable was neither advanced nor argued nor briefed by any party to this lawsuit. In its haste to hold Mobil Oil Corporation liable on some theory, the court has completely disregarded Texas law. It has rendered a decision that can meet the test of neither precedent nor logic.

We urge that this Honorable Court consider the far reaching nature of the Court of Appeals opinion. We urge that it realize that it completely changes the duty of every landlord. We urge that it understand that the opinion is contrary to every reported opinion in the State of Texas. We urge that it note that in reaching this extraordinary conclusion the Court of Appeals was able to cite neither a case nor a commentator supporting its position. The opinion is clearly wrong.

CONCLUSION

Because the Court of Appeals has, contrary to existing law in Texas and other jurisdictions, created an impossible and intolerable burden for lessors of property, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of August, 1973, three copies of the Petition for a Writ of Certiorari were mailed, postage prepaid, certified, return receipt requested, to Mr. John O'Quinn, Attorney at Law, 500 Houston First Savings Building, Houston, Texas 77002, counsel for the respondent. I further certify that all parties required to be served have been served.

B. JEFF CRANE, JR.

Counsel for Petitioner

APPENDIX "A"

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-2726

MRS. GILBERT LEE WOOLARD, a widow, ET AL.,
Plaintiffs-Appellees,

versus

MOBIL PIPE LINE COMPANY, ET AL.,
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Texas

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(June 7, 1973)

Before TUTTLE, THORNBERRY and DYER, Circuit Judges.

THORNBERRY, Circuit Judge: On the night of June 20, 1969, Gilbert Lee Woolard, an employee of Appellant Mobil Pipe Line Company, was working at that company's Beaumont, Texas, metering station with two other

men: Red Marsh, another Pipe Line Company employee, and Walton Goodwin, an employee of appellant Mobil Oil Corporation, which leased the land on which the metering station was located to Mobil Pipe Line, its wholly-owned subsidiary.[1] The men were removing water from a ten-inch liquid petroleum gas (LPG) pipeline running from Corsicana, Texas, through Pipe Line's Beaumont metering station and into the Mobil Oil refinery immediately adjacent to the metering station. The water was moving down the line under pressure, having been inserted to facilitate repairs on two sections of the line. During the repairs, the water had become separated into two slugs, the first of which arrived at the metering station at approximately 9:15 a.m. on June 20, 1969, and was removed without incident, by diverting it from the ten-inch LPG line into a four-inch and then a two-inch line, and thence into an open ditch along the east side of the metering station.

The second slug of water arrived at the metering station at approximately 7:00 p.m. on June 20, and the three men began discharging it through the four- and two-inch lines into the open ditch. Directly behind this slug of water, the pipe was filled with extremely flammable LPG; in order to prevent the LPG from being discharged into the open ditch where it might ignite, the men at the metering station had to have an accurate idea of the arrival time of the "interface" between the water and the LPG, so that they could divert the LPG either into the Mobil Oil refinery through the ten-inch line, or

1. Pointing to the fact that the lease calls for a consideration of only one dollar per year, appellees urge us to treat the lease as a mere formality. We decline, however, to base our decision on this ground.

into Mobil Oil's flare system, which was available for the metering station's use in emergencies.

Mobil Pipe Line's dispatcher in Dallas had earlier told Marsh, the other Pipe Line employee at the metering station, that the estimated time of arrival of the water-LPG interface at the metering station was 12:35 a.m., June 21; but at 10:45 p.m. on June 20, while the second slug of water was discharging from the line, Marsh was told that the water-LPG interface could arrive at any time. The interface arrived at 11:25 p.m.; LPG was discharged into the atmosphere through the four-inch and two-inch lines and was ignited by some unknown source. The resulting explosion and fire took the lives of all three men in the metering station.

Woolard's parents and his widow, on behalf of herself and her children, filed this wrongful death and survival action in the court below. In response to special interrogatories, the jury found that Mobil Oil Corporation was negligent in failing to provide a flare system for the exclusive use of Mobil Pipe Line's metering facility, and that Mobil Pipe Line, Woolard's employer, was grossly negligent in several respects to be fully discussed below.[2] Judgment was entered against Mobil Oil Corporation for $125,000, and against Mobil Pipe Line Company for $100,000, and this appeal followed. We affirm the judgment against Mobil Oil Corporation, but reverse the judgment against Mobil Pipe Line Company.

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2. It is without dispute that Woolard's employer, Mobil Pipe Line, is a subscriber to the Texas Workman's Compensation Act, Tex. Rev. Civ. Stat. Ann. Art. 8306, and that benefits under that Act have been paid to his survivors. Under Texas law, therefore, Woolard's survivors can recover from Mobil Pipe Line only if Mobil Pipe Line was grossly negligent. *Id.* § 5.

I.

Negligence of Mobil Oil

Pointing to the fact that it leased the land on which the metering station was located to Mobil Pipe Line Company, Mobil Oil claims that it was a mere landlord without possession or control of the premises, and as such owed its tenant's employee, Woolard, no duty to use reasonable care to eliminate dangerous conditions at the metering station. Appellees, on the other hand, contend that the evidence established that Mobil Oil was a "joint venturer" with Mobil Pipe Line in the operation of the metering station, and that Mobil Pipe Line's negligence could therefore be imputed to Mobil Oil.

The Texas doctrine of "joint venture" makes each party thereto the agent of the other for purposes of tort liability; when the facts show a joint interest in the purpose of the enterprise and an equal right to control its conduct, the doctrine imposes vicarious liability upon a party for the other's negligence. *Bonney v. San Antonio Transit Co.*, 325 S.W.2d 117 (Tex. 1959); *Straffus v. Barclay*, 219 S.W.2d 65 (Tex. 1949). In the case at hand, the jury found that Mobil Oil Corporation was negligent, in its own right, in failing to provide a flare system for the exclusive use of the metering station,[3] Mobil Oil argues

3. Mobil Oil's refinery flare system, whereby petroleum products could be safely disposed of, was available for the metering station's use in emergencies; there was no flare system for the exclusive use of the metering station. The testimony suggested that the refinery flare system was inadequate to handle the quanitity of water that would have to have been discharged through it to insure the safe discharge of the LPG (App. 212; 369), and that the men in the metering station knew that the refinery flare system was inadequate for this purpose. (App. 369).

that it could not have been negligent because in its role as landlord it owed no duty to Mobil Pipe Line's employees. The doctrine of joint venture, however, is one of imputed, not actual, negligence; if one of two joint venturers is negligent, then the negligence of the other is immaterial to the imposition of vicarious liability upon him. A determination of whether Mobil Oil and Mobil Pipe Line were joint venturers in the operation of the metering station is therefore irrelevant to the question whether Mobil Oil itself breached a duty it owed to Woolard. Accordingly, we intimate no view as to whether the evidence showed that Mobil Oil and Mobil Pipe Line were joint venturers, and instead turn to the question whether Mobil Oil owed to Woolard a duty to use reasonable care to eliminate dangerous conditions at the metering station.

According to Texas law, a landlord who does not agree to repair the leased premises and who does not fraudulently conceal defects of which he has knowledge, is under no duty to either his tenant or the tenant's employee to correct an unsafe condition on the premises. *Flynn v. Pan American Hotel*, 183 S.W.2d 446 (Tex. 1944); *Yarbrough v. Booher*, 174 S.W.2d 47 (Tex. 1943); *Daniels v. Shell Oil Co.*, 485 S.W.2d 948 (Tex. Civ. App.—Ft. Worth 1972, writ ref'd n.r.e.); *Katz v. Southwestern Scrap Materials Co.*, 412 S.W.2d 685 (Tex. Civ. App.—Dallas 1967, no writ).[4] This rule, however, is subject to exceptions. If the lease is a mere sham employed by the "landlord" to fraudulently conceal his continued control over the premises, Texas courts impose upon him a duty owed to his tenant and to those entering under the

4. *But see* Fergeson v. National Bank of Commerce, 174 S.W.2d 1015 (Tex. Civ. App.—Galveston 1943, no writ).

tenant to use ordinary care to guard against dangerous conditions. *Johnson v. Murry Co.*, 90 S.W.2d 920 (Tex. Civ. App.—Austin 1936, writ dism'd); *Oriental Investment Co. v. Barclay*, 64 S.W. 80 (Tex. Civ. App.—1901, error ref'd). Likewise, the landlord is under a duty to use ordinary care to eliminate unsafe conditions on portions of the leased premises over which he has retained exclusive control, *Brown v. Frontier Theaters, Inc.*, 369 S.W.2d 299 (Tex. 1963), and in areas reserved for the common use or benefit of several tenants occupying the premises. *Hall v. Medical Building of Houston*, 251 S.W. 2d 497 (Tex. 1952); *Lang v. Henderson*, 215 S.W.2d 585 (Tex. 1948).

In each of these situations in which Texas courts impose a duty of ordinary care upon a landlord, the landlord, by virtue of his continued possession or control of the premises, is in a position to know of the defect and to take steps to correct it. Although our research has disclosed no Texas case involving the precise facts of the instant one, we conclude that Texas courts would impose a duty to use ordinary care upon a landlord who shares control of the leased premises with his tenant. Furthermore, our review of the record discloses sufficient evidence from which a jury could reasonably conclude that control over the Beaumont metering station was shared by Mobil Oil and Mobil Pipe Line. Mobil Oil could veto any of Mobil Pipe Line's proposed alterations in the metering station which Mobil Oil considered unsafe (App. 314); Mobil Oil employees had keys to unlock gates in the fence surrounding the metering station (App. 294-95), and new Mobil Oil executives were given a tour of the metering plant as part of their orientation (App. 291); Goodwin, the Mobil Oil employee who was

killed in the explosion, had the authority to decide when to open and close valves during the purging operation (App. 343-52; 363). Accordingly, we hold that there was evidence from which the jury could properly decide that Mobil Oil owed to Woolard a duty to use ordinary care to eliminate dangerous conditions at the metering station.

Mobil Oil's contention that proximate causes was not established need not detain us long. Mobil Oil argues that the failure to provide an adequate flare for the exclusive use of the metering station had nothing to do with Woolard's death, because there was no proof that any of the men attempted to close the one valve necessary to divert the LPG into the refinery's flare system. But the jury could reasonably conclude that the valve was not closed because the LPG had vaporized and frozen it (App. 396-97), or because the men at the metering station knew that the refinery's flare system was inadequate under these circumstances (App. 366-69). In short, the failure to close the valve did not preclude a finding of proximate cause.

Mobil Oil contends further that the trial court erroneously overruled its objections to evidence showing alterations in procedure and equipment made subsequent to the accident at the metering station. In particular, Mobil Oil objected to evidence showing that employees of Mobil Oil and Mobil Pipe Line jointly decided to leave unlocked the gates in the fence surrounding the metering station (App. 324), and to testimony concerning the method of discharging water and LPG that is now followed at Mobil Oil's new Spindletop facility. The general rule in both the Texas and the federal courts is that evidence of subsequent repairs or modifications is not ad-

missible, owing both to the strong policy favoring remedial measures and to the danger that the jury may draw an unwarranted inference that the repairs or modifications are an admission of negligence. *Roosth & Genecov Production Co. v. White*, 262 S.W.2d 99 (Tex. 1953); *Eastern Airlines, Inc. v. American Cyanamid Co.*, 5th Cir. 1963, 321 F.2d 683. Such evidence is admissible, however, under a proper limiting instruction, to resolve a dispute between the parties as to whether the defendant exercised control over the premises in question. McCormick, Evidence § 275 (2d ed. 1972). One of Mobil Oil's primary contentions in the instant case, both in the court below and on this appeal, has been that it had no connection with the operation of the metering station. Evidence that its employees participated in the decision to leave the gates unlocked was therefore relevant to the disputed issue of control of the metering station premises; and, in our view, was properly admitted under the trial court's limiting instruction (App. 325). Evidence of procedures employed at the Spindletop facility could, however, have no bearing on that issue, because the Spindletop station is wholly separate from the Beaumont metering station and was not completed until after the occurrence in question. But a thorough study of the record convinces us that any error in the admission of this evidence was harmless.

II.

Gross Negligence of Mobil Pipe Line

In answer to special interrogatories, the jury found that Mobil Pipe Line Company was grossly negligent in five respects, each of which was a proximate cause of Woolard's death:

(1) In locating an office building on the premises of the metering station with window unit air conditioners, a water heater with an open flame, and a non-explosion-proof telephone;

(2) In actively furnishing inaccurate dispatch information under the circumstances;

(3) In discharging water and gas into the atmosphere;

(4) In building and maintaining the four-inch line used to bleed off water followed by LPG

(5) In requiring Woolard, a novice at this type of operation, to work without providing him a flare system to be used exclusively by the metering station.

We are compelled to reject these findings. The first three set out above were clearly insufficient predicates for awarding exemplary damages. First, even assuming that the presence of the air conditioners, water heater, and non-explosion-proof telephone was evidence of gross negligence on Mobil Pipe Line's part, the record contains not a shred of evidence suggesting that any of these devices caused the explosion and fire. A Pipe Line employee testified that when he arrived at the metering station shortly after the explosion, some grass and a sample building on the premises were on fire, but the office building containing the air conditioners, water heater, and telephone was not burning. Moreover, appellee's expert witness testified that if these devices had been the source of ignition, the office building probably would have exploded. Apart from whether Mobil Pipe Line was grossly negligent in maintaining the equipment in the office building, then, its conduct in this respect was clearly not a proximate cause of Woolard's death.

Secondly, Mobil Pipe Line cannot, under Texas law, be held liable for the gross negligence, if any, of its dispatcher in "actively furnishing inaccurate dispatch information." Texas law permits the award of exemplary damages against a corporation only if the grossly negligent employee is a "vice principal," a category including: (1) corporate officers, (2) employees authorized to hire and fire, (3) employees performing "nondelegable" corporate duties, and (4) department or division managers. *Fort Worth Elevators Co. v. Russell,* 70 S.W.2d 397 (Tex. 1934); *LeJeune v. Gulf States Utilities Co.,* 410 S.W.2d 44 (Tex. Civ. App.—Beaumont, 1966, writ ref'd n.r.e.); *Wooley v. Southwest Portland Cement Co.,* 5th Cir. 1959, 272 F.2d 906. There is nothing to suggest that the dispatcher had sufficient managerial authority to make him such a vice principal, and Mobil Pipe Line consequently may not be held liable for his alleged gross negligence.

Thirdly, the finding that Mobil Pipe Line was grossly negligent in "discharging water and gas into the atmosphere" is not a proper basis of liability. The discharge of the LPG is the very accident complained of. It was not the purpose of the purging operation to discharge water and LPG into the atmosphere; indeed, Mobil Pipe Line had taken measures (including an arrangement to use the refinery flare system and the employment of a dispatcher to warn the men of the arrival of the interface) to avoid such an accident. A finding that an accident occurred is by itself insufficient to impose liability upon a defendant for gross negligence or even for ordinary negligence. There must be a finding that the defendant's conduct caused the accident.

The last two jury findings set out above do not satisfy the strict Texas requirement for proof of gross negligence.

In *Sheffield Division, Armco Steel Corp. v. Jones,* 376 S.W.2d 825, (Tex. 1964), the Texas Supreme Court reaffirmed the definition of gross negligence first stated in *Missouri Pacific Railroad Co. v. Shuford,* 10 S.W. 408 (1888):

> Gross negligence, to be the ground for exemplary damages, should be that entire *want of care* which would raise the belief that the act or omission complained of was the result of a *conscious indifference* to the right or welfare of the person or persons to be affected by it. (Emphasis supplied).

In *Sheffield* the deceased was killed when an electrical spark ignited gas in a machine he had been ordered by his supervisor to inspect. The procedure established by the employer for removing gas from the machine before inspection had proven inadequate. The deceased's supervisor knew that gas was present when he ordered the deceased to inspect the machine, but assured the deceased that it was safe to begin the inspection nevertheless. The Supreme Court held that this evidence did not warrant a finding of gross negligence, pointing to the existence of admittedly inadequate safety measures. In the court's view, the "evidence failed to meet the requirement that there be an entire want of care so as to raise the belief that the acts complained of were the result of a conscious indifference to the rights or welfare of others. There does not appear to be an indication of willfulness, wantonness, or malice." 276 S.W.2d at 832.

In the wake of *Sheffield,* Texas Courts of Civil Appeals have decided several cases which illustrate the stringent requirements of the Texas concept of gross negligence. *Armstrong v. Texas Power & Light Co.,* 399 S.W.2d 922

(Tex. Civ. App.—Tyler, 1966, writ ref'd n.r.e.), for example, arose out of the electrocution of a utility company lineman engaged in the removal of a charged wire from a utility pole near a highway. The job required that the wire be placed across the highway temporarily. In clear violation of company safety regulations, the deceased's foreman failed to post a flagman to stop oncoming cars; a car drove into or across the line, suddenly bringing it into fatal contact with the deceased. The Court of Civil Appeals held that this evidence failed to demonstrate that the foreman acted with a conscious disregard of the deceased's safety.

In *Loyd Electric Co. v. DeHoyos*, 409 S.W.2d 893 (Tex. Civ. App.—San Antonio, 1966 writ ref'd), an employee was killed while inspecting aircraft fuel pumps. The pumps were mounted on a stand, under which were placed drip pans to catch highly volatile aircraft fuel. In close proximity to the drip pans were electrical connections with clamps that were described at trial as not being of the safest variety available. A spark from the faulty connections ignited the fuel in the drip pans, killing the employee. The court held that, although the employer failed to use ordinary care to avoid such an accident, the evidence did not reveal an entire want of care and therefore there was no gross negligence.

Finally, in *Thomas v. T. C. Bateson Co.*, 437 S.W.2d 386 (Tex. Civ. App.—Dallas 1969, writ ref'd n.r.e.), a construction worker fell four floors to his death when a cement buggy he was operating slipped off a ramp, which was only two inches wider than the wheel base of the buggy. The ramp was covered with wet concrete, and the employer had furnished no guard rails or other protective devices. The employee was a novice at this type

of work, and had made only two trips up and down the ramp at the time of the accident. Nevertheless, the court, relying on *Sheffield, supra,* held that gross negligence had not been established. *See also Stevens v. Dunn,* 417 S.W. 2d 608 (Tex. Civ. App.—Tyler, 1967, no writ) (statement by driver of truck which had struck and killed employee that "the son of a bitch is better off dead than he would be alive," held not to evidence intent or conscious disregard for the safety of the deceased workman).

As these cases indicate, the Texas view of gross negligence contemplates something just short of intentional wrongdoing. Indeed, the summary contained in 13 Tex. Jr. § 133 and quoted approvingly in *Sheffield, supra,* states that recovery of exemplary damages requires a showing, not merely that defendant could have or ought to have foreseen the injury, but that "he acted intentionally or willfully or with that degree of 'gross negligence' which approximates a fixed purpose to bring about the injury of which Plaintiff complains." The Texas standard demands both advertence to an unreasonable risk of harm to the plaintiff and an entire want of care (not merely a failure to take reasonable precautions) to avoid harm to the plaintiff.

Appellees cite only one instance in which a plaintiff in a case like the one at bar has carried the seemingly impossible burden imposed by this view of gross negligence.[5] In *Phillips Petroleume Co. v. Linn,* 5th Cir. 1952,

5. Appellees rely on several cases arising under the Texas guest statute, to support the verdict against Mobil Pipe Line. In *Sheffield, supra,* the Texas Supreme Court stated that such cases do not govern suits against employers for exemplary damages for the death of deceased employees, because exemplary damages are compensatory in nature in guest statute suits, but are considered punitive in nature in such cases as the instant one. 376 S.W.2d at 831.

194 F.2d 903, an employee was killed while operating a sandblasting machine attached to a hose labeled "H.P. Air." (meaning "high pressure air"). In fact, the hose contained high pressure *gas*, and a spark thrown by a particle of sand caused the gas to explode. The foreman of the deceased workman had known for some time that the hose was mislabeled, and prior to the accident the foreman had written "gas" on the line in soapstone. By the time of the accident, however, the soapstone marking had worn off (the foreman testified that he had expected it to wear off), leaving only the deceptive label "H.P. Air."

This court's holding that the foreman was grossly negligent was fully consistent with the Texas case. As witnessed by his half-hearted effort to correct the label on the hose, the foreman recognized the almost inevitable consequences of attaching a sandblasting machine to the gas line. But by the same token, the precautions he took to correct the defective label—the soapstone marking which he knew would wear off—were not "precautions" at all. They were, in short, an "entire want of care."

Phillips, however, is not this case. True enough, the end of the four-inch line in the instant case extended only a few feet outside of the fence surrounding the metering station, a fence that was locked and that was difficult to climb. The water heater, telephone, and air conditioners in the office building were possible sources of ignition; and it was known that the dispatcher could give an estimate of the arrival time of the LPG that might be inaccurate by as much as thirty minutes. Moreover, the jury could reasonably have found that Woolard was a novice at the purging operation, and was required to do the work without having exclusive access to an

adequate flare system. From all of this, the jury could reasonably conclude that Mobil Pipe Line Company failed to exercise ordinary care to avoid harm to Woolard. It may even be assumed that Mobil Pipe Line, through its managerial personnel, knew that Woolard was being subjected to an unreasonable risk. But the obstacle to recovery of exemplary damages in this case is the fact that Mobil Pipe Line had taken measures to avoid such a tragedy by arranging for the use of the refinery flare system in emergencies and by employing dispatchers to calculate the estimated arrival time of the LPG at the metering station. However inadequate these steps may appear in retrospect, they are nevertheless sufficient to negate a finding of an entire want of care on the part of Woolard's employer. Accordingly, the award of exemplary damages against Mobil Pipe Line Company is reversed.

In conclusion, we affirm the judgment against Mobil Oil Corporation, and reverse the judgment against Mobil Pipe Line Company.

AFFIRMED in part; REVERSED in part.

APPENDIX "B"

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-2726

MRS. GILBERT LEE WOOLARD, a widow, ET AL.,
Plaintiffs-Appellees,

versus

MOBIL PIPE LINE COMPANY, ET AL.,
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Texas

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion June 7, 1973, 5 Cir., 1973 ____ F.2d ____).

(July 16, 1973)

Before TUTTLE, THORNBERRY and DYER, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.